STATE OF MICHIGAN

COURT OF APPEALS

BILLIE WADDELL,

Plaintiff-Appellant,

v

TRIZEC HAHN OFFICE PROPERTIES and TRIZEC NEW CENTER DEVELOPMENT ASSOCIATES,

Defendants-Appellees.

UNPUBLISHED
June 19, 2001

No. 221374
Wayne Circuit Court
LC No. 98-816142-NO

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition for defendants in this premises liability action. We affirm.

Plaintiff was injured when she was struck on the head by a parking lot barrier gate arm in defendants' New Center Place parking lot in Detroit. The parking lot is enclosed by a wrought iron fence. The ingress and egress of vehicular traffic is controlled by electronic barrier gate arms in the entrance and exit lanes. In the entrance lane, the gate arm automatically rises when a customer takes a ticket. In the exit lane, the gate arm rises only when payment and a ticket are entered into the system by an attendant in a booth between the two lanes. Electronic sensors control the lowering of the gate arm after the exiting vehicle has cleared the gate in order to prevent unauthorized vehicles from entering the lot through that lane. A warning sign is posted on the mechanism box of the barrier gate arm which reads: "Caution Autos Only No Motorcycles, Bicycles or Pedestrians." The pedestrian exit is located on the west side of the parking lot near the entrance to Crowley's Department Store and the New Center One Building.

On December 16, 1997, at approximately 2:00 p.m., plaintiff parked her car in defendants' lot. The pedestrian exit was in the opposite direction of plaintiff's destination. Plaintiff attempted to exit the lot on foot through the vehicle exit lane. As she proceeded into the lane, the raised gate arm came down and struck plaintiff on her head.

Plaintiff alleged that defendants breached their duty to make their property safe for invitees based upon a failure to warn, negligent maintenance, and unreasonably unsafe conditions. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and

(C)(10). Defendants argued that no genuine issue of material fact existed regarding the open and obvious nature of the danger posed by the barrier gate arm. After considering the documentary evidence presented, the trial court agreed and granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

We review de novo a trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* at 120; *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Where a motion is made and supported under MCR 2.116(C)(10), an adverse party may not merely rest upon the allegations or denials of her pleading, but must set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Maiden*, *supra* at 120-121. When this Court reviews a motion for summary disposition under MCR 2.116(C)(10), it considers the affidavits, pleadings, depositions, admissions and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, *supra* at 120. This Court must review the record in the same manner as the trial court to determine whether the moving party was entitled to judgment as a matter of law. *Id.* at 121.

In order to establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). The duty that an owner or occupier of land owes to a visitor depends upon the status of the visitor at the time of the injury. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999). A visitor may be a trespasser, a licensee, or an invitee. *Id.* Here, plaintiff visited defendants' parking lot as an invitee, one who enters the land of another for a commercial purpose on an invitation that carries with it an implication that reasonable care has been used to prepare the premises and to make them safe. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597, 604; 614 NW2d 88 (2000).

An invitor owes a duty to his invitees to inspect the premises and make any necessary repairs or warn of discovered hazards. *Stitt*, *supra* at 597. Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Rather, an invitor must warn of hidden defects but is not required to eliminate or provide warnings of open and obvious dangers unless the invitor should anticipate the harm despite the invitee's knowledge of it. *Id.* at 613, quoting *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495, 498; 595 NW2d 152 (1999). Whether a danger is open and obvious depends upon whether it is reasonable for the invitor to expect that an average user of ordinary intelligence would discover the danger after casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). "[I]f the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions." *Bertrand*, *supra* at 611.

Plaintiff argues that the trial court erred when it concluded as a matter of law that the danger posed to pedestrians by the normal operation of defendants' parking lot barrier gate arm was open and obvious. We disagree. The photographs attached to plaintiff's response brief indicate that the gate arm was fully visible to both pedestrians and drivers. At least one of the photographs clearly demonstrates that the gate arm moves up and down in response to vehicular traffic. The deposition testimony of office manager Margaret Bustillo indicates that the barrier gate arm was bright yellow. Finally, an eight-and-one-half-inch high sign clearly cautioned that lane was intended for vehicles only, and not for pedestrians. Although plaintiff maintains that the warning sign was inadequate, and as such, the danger presented by the gate arm was not open and obvious, this Court has previously stated that "the analysis whether a danger is open and obvious does not revolve around whether steps could have been taken to make the danger more open or more obvious. Rather, the equation involved is whether the danger, as presented, is open and obvious." *Novotney, supra* at 474-475. We conclude that plaintiff failed to show a genuine issue of material fact regarding whether the danger from the normal operation of the gate arm was open and obvious. The trial court did not err in determining that the risk of harm posed by the gate arm represented a danger that an average person of ordinary intelligence should have been able to appreciate upon casual inspection. *Eason, supra* at 264.

Plaintiff further argues that she presented evidence to establish a genuine issue of material fact regarding whether defendants' parking lot gate arm posed an unreasonable risk of harm despite its open and obvious nature. We disagree. The sum total of plaintiff's evidence to the trial court on this issue appears to be a deposition in which defendants' employee stated his opinion that pedestrians probably exit through the vehicle lane on a regular basis, and a maintenance report that is virtually unintelligible. As the trial court noted, plaintiff presented no evidence that the gate arm was negligently maintained, no evidence of prior pedestrian injuries, and no evidence that defendants failed to exercise reasonable care in the maintenance of the parking lot. The record is devoid of evidence of any malfunction of the barrier gate arm. Contrary to plaintiff's claim that she was forced to walk through the vehicle exit lane, the record indicates that a pedestrian exit and walkway was located at the other end of the parking lot. In her brief in support of her response to defendant's motion for summary disposition, plaintiff describes the pedestrian exit as "grossly inconvenient and improper." The fact that the pedestrian exit may have required plaintiff to walk in the opposite direction of her destination to exit the lot does not compel the conclusion that the gate arm posed an unreasonable risk of harm. When the evidence is viewed in a light most favorable to plaintiff, she failed to establish a genuine issue of material fact regarding whether defendants' parking lot barrier gate arm represented an unreasonable danger notwithstanding its open and obvious nature. Accordingly, we conclude that the trial court properly granted defendants' motion for summary disposition.

Next, plaintiff contends that the trial court erroneously applied the open and obvious doctrine in granting summary disposition of her claim that defendants negligently maintained their property and failed to make their property safe for invitees. Plaintiff argues that the open and obvious doctrine pertains only to failure to warn claims and is inapplicable to general negligence claims premised on a failure to maintain premises in a reasonably safe condition. This Court expressly rejected this argument in *Millikin, supra*. In that case, this Court stated that "the open and obvious doctrine applies both to claims that a defendant failed to warn about a dangerous condition and to claims that the defendant breached a duty in allowing the dangerous

condition to exist in the first place." *Millikin*, *supra* at 495. The *Millikin* Court held that "the doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability." *Id.* at 497.[1] Accordingly, the trial court properly granted summary disposition of plaintiff's remaining claims on the basis of the open and obvious doctrine.

Finally, plaintiff argues that the trial court acted contrary to the tenets of the common law by applying the open and obvious defense to plaintiff's failure to make safe claims. Again we reject plaintiff's argument on the authority of *Millikin*, *supra*. In any event, plaintiff's argument that the current application of the open and obvious danger doctrine rewards business invitors for negligent maintenance of property is incorrect. As noted above, the open and obvious defense doctrine does not apply to hazards that are unreasonably dangerous despite being open and obvious. *Bertrand*, *supra* at 611.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] The *Millikin* Court noted: "Of course, *Bertrand* further held that this is not the case, i.e., observation of an open and obvious danger would not prevent injury, if, notwithstanding that observation, an unreasonable risk of harm remains." *Millikin*, *supra* at 497 n 5.